SUPREME COURT, U. S

Supreme Court, U.S.
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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971.

No. 71-831

JOSEPH GIORDANO, SAM GIORDANO and JOSEPHINE GIORDANO,
Appellants,

v.

H. F. STUBBS, BOB E. L. POPE, SUMMER-MINTER AND ASSOCIATES, INC., and HUGH SUMMER,
Appellees.

On Appeal from the Supreme Court of Georgia

## APPELLANTS' REPLY BRIEF

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## APPELLANTS' REPLY BRIEF

Appellants respectfully request the Court's consideration of this Reply Brief.

### WAIVER

In his motion to dismiss, appellee Stubbs relies principally upon a contention that the appellants waived their constitutional right to receive notice before losing their property. This supposed waiver is said to come from the following circumstance. The grantor of the first security deed acquisced in all the provisions of that security deed, including the provisions of a power of sale contained in

it. That power of sale purported to waive actual notice of foreclosure. Appellants, who later accepted a second security deed on the property were, in the words of the Georgia Supreme Court quoted by appellee on page 7,

> "in privity with the grantor in the deed to secure debt."

Therefore, it is argued, they would be entitled to receive only the notice prescribed in the security deed.

In other words, the claim is not that appellants herein expressly or intentionally waived their constitutional right to receive notice before losing their property. The essence of appellee's position is that a second creditor has notice of all provisions of the first security deed, or must be charged with such notice, and therefore adopts any waivers contained therein. Since waiver of notice provisions in security deeds are commonplace (part of the "boiler plate"), appellee's argument amounts to an argument on the merits to the effect that the holder of a second security deed can be deprived of his property without notice in virtually every case.

Aside from the fragment of a sentence taken out of context from **Boddie v. Connecticut**, 401 U.S. 371 (1971), (and turned around and pointed in the opposite direction from that which this Court gave it) the appellee relies primarily upon certain lower court decisions such as **Fuentes v. Faircloth**, 317 F. Supp. 954 (S.D. Fla., 1970). This Court has of course heard oral arguments in **Fuentes** and its companion cases, **Swarb v. Lennox** and **Parham v. Cortese**, as reported in 40 L.W. 3233 (Nov. 16, 1971). It seems to us that the appellee's contentions made for a waiver in this case are even more tenuous than the comparable positions in those cases. Even if that is not so, the fact that the Court has the **Fuentes** and other cases before it argues in favor of accepting jurisdiction in the case at bar.

## THE RIGHT TO RECEIVE NOTICE

There is an aspect to the case at bar which makes it stronger than many of the other cases in which this Court has held that due process requires actual notice. In a case such as **Sniadach v. Family Finance Corporation,** 395 U.S. 347, 23 L.ed. 2d 349, 89 S.Ct. 1820 (1969), the issue is not whether the party whose property is taken will **ever** receive a hearing, as is the issue in the case at bar. In **Sniadach** the Court held that wages could not be garnished off a pending suit and that to do so was a taking without due process. The defendant in **Sniadach** would have been entitled to a hearing at some time on the merits of the case and the issue decided by this Court was simply whether the defendant was entitled to a hearing before the garnishment. In the case at bar, the question is whether the holder of a subordinate security interest will ever, repeat **ever**, have a hearing. If the position of the appellee is sustained, there will not be a temporary taking of the appellants' property without notice and opportunity to be heard, with the possibility of ultimate vindication and redress. On the contrary, if the appellee's position is sustained, the appellants will have lost their property without notice and opportunity to be heard and there will never be a hearing. In **Mullane** and the subsequent cases, such as **Boddie v. Connecticut,** *supra*, the Court has pointed out that:

> "The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved **and the nature of the subsequent proceedings.**" (Emphasis supplied.)
>
> **Boddie v. Connecticut,** 28 L.ed. 2d at 119.

We are dealing with a situation in which there are no subsequent proceedings.

## THE NATURE OF THE NOTICE RECEIVED

A too hasty reading of appellee's brief or of the opinion of the Georgia Supreme Court might lead one to conclude that it is being said that appellants had notice of the foreclosure. We have particular reference to the excerpt from the opinion of the Supreme Court of Georgia quoted on page 7 of appellee's brief as follows:

> "This deed constituted a contract between Gaston as grantor and Stubbs as grantee, and its provisions are controlling as to the rights of the parties and their privies. Stubbs complied with its terms . . . Giordano complains that he was not notified; however, the record shows otherwise. There is nothing in the security deed, nor in the laws of Georgia, which would require Stubbs to give actual notice that he was exercising the power of sale. Giordano, being in privity with the grantor in the deed to secure debt, was entitled to no other notice than the advertisement in accordance with the provisions of the security deed."

It can be seen that the notice to the appellants that the Court is referring to is the notice by publication which was not actually seen by the appellants. Appellants did not receive notice. The matter is not in dispute, as the whole record will show. It would be pointless for the Georgia Supreme Court to discuss the proposition that the appellants were not entitled to any notice other than the notice by publication prescribed in the first security deed if it were at the same time predicating its ruling upon a finding that the appellants had actual notice.

In accordance with Rule 12, we are requesting the Clerk of the Georgia Supreme Court to certify and transmit to this Court certain portions of the record relating to the notice received by appellants. However, it is not

an issue. Counsel for appellee has never contended during the course of the litigation that appellants were given notice of the foreclosure by any means other than publication. Pending transmittal to the Court of appropriate portions of the record, we take the liberty of setting out two interrogatories by the appellants to the appellee Stubbs, and his sworn answers:

INTERROGATORY NO. 10:

"Did you give notice of the intended foreclosure to any person by any means other than the publication in the newspaper in Gwinnett County? If so, to whom did you give such notice, and by what means? On what dates did you give such notice?"

ANSWER:

"Yes, by letter of my attorney dated December 11, 1969, attached as Exhibit 'C'."

INTERROGATORY NO. 13:

"Why did you not give notice of the default to either of the plaintiffs?"

ANSWER:

"They were not the owners of the property at the time of the default."

The letter attached as Exhibit "C" was as follows:

"December 11, 1969

Mr. Donald E. Gaston
1808 Angelique Drive
Decatur, Georgia 30033

Re: Promissory Note—Donald E. Gaston
to H. F. Stubbs

Dear Mr. Gaston:

We represent H. F. Stubbs who is the holder of a Promissory Note executed by you in the principal sum of $30,000.00.

This is to advise you that said Note was due and payable in full on November 14, 1969, and Mr. Stubbs has not yet received payment. Accordingly, in the event this indebtedness is not paid within ten (10) days from receipt by you of this demand, it will be necessary for us to institute legal proceedings to recover said sum along with ten per cent (10%) thereof as Attorneys Fees, all as is provided in said Note.

Please direct any correspondence concerning this matter to the undersigned as Attorneys for Mr. Stubbs.

Yours very truly,
HUIE and HARLAND
James R. Harland, Jr.

JRHjr/mek

cc: Mr. Bob E. L. Pope"

These answers (and the letter) show that no notice of either the default or the foreclosure was given to the appellants. The letter notice of the intention to foreclose was sent to the owner, Pope, and to the original debtor, Gaston, who was by that time long since out of the picture. Appellees did not send the letter to Appellants, who would have protected their interests.

## ERRATA

In the Jurisdictional Statement the citation to **Mullane v. Central Hanover Bank & Trust Company** was given incorrectly several times. It should have been 94 L.ed 865 rather than 875. On the cover the name of Bob E. L. Pope improperly appears as Hope. On page 4, second line from the bottom, the word October should read November. None of these errors affects the merits but we beg the Court's pardon.

## CONCLUSION

We respectfully urge the Court to note jurisdiction of the case. We believe that this case is stronger against the application of a concept of waiver than **Fuentes** and its companion cases, but that if the Court should reverse those cases such a ruling would be dispositive of the case at bar. Even if this Court should affirm **Fuentes** we believe that there is no basis for a finding of waiver in the case at bar; no such finding was made by the lower court. Due process clearly requires that the holder of a subordinate security interest receive some kind of notice. There are no exigent circumstances in the case at bar to justify depriving appellants of the opportunity to protect their interests.

Respectfully submitted

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